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THE TORRENS SYSTEM.

The principle of the "Torrens System" is conveyance by registration and certificate instead of by deed, and assimilates the transfer of land to the transfer of stocks in corporations. The Torrens system was adopted in some states at the wish of the landowners of the states, as evidenced by the proceedings of Farmers' Unions, Chambers of Commerce of many cities, and other similar organizations. But it can hardly be said that the act passed by our legislature was done so at the wish of the people of the state, for as a matter of fact only a very small percentage of them asked for or even wanted such legislation.

The basis principle of this system is the registration of the title to the land instead of registering, as under the older system, the evidence of such title. While the statutes in the various states differ in detail yet the primary purpose of all is to create an indefeasible title in the registered owner as well as to simplify the transfer of land.

Like similar statutes in other jurisdictions however, its adoption by landowners is with us optional and not compulsory. Its features need not be discussed, as they can be found in the act itself.

It is not in derogation of common right, but is a remedial statute and to be liberally construed, according to its intent, "so as to advance the remedy and repress the evil."

In some of the statutes constitutional defects were at first, found by those courts whose judges were not favorable to the innovation. But the acts were corrected in those states so as to remove the objections found, or succeeding judges held the acts to be constitutional.

So far as we know there are only three systems of transferring real estate in use: (1) the transfer without recording or registering; (2) the ministerial system of recording deeds; and (3) the judicial system of registering titles.

The first system is used in most of the counties of England, where land is transferred merely by the production and delivery of all the title deeds, including one from the seller to the purchaser. This is a substitute for the original common-law system of "livery of seizin." Under the law of primogeniture the eldest son inherits the real estate and the title papers go with the land. Until about fifty years ago land was scarcely considered a commercial commodity in England, and the rarity of its transfer made the above system less inconvenient than it would otherwise have been. Under that system the owner of land could borrow money on the security of his land by merely depositing his title papers with the lender, who thus acquired an equitable lien on the land. This was popular with both borrowers and lenders, because it was cheap, safe, and secret.

The second system (of recording deeds) was the only one in use in this country before the adoption of the Torrens system, and prevails also in most of the countries of Europe, outside of England, and in South America and in Middlesex and York in England. In most of these countries, however, the conveyances are not recorded in full, but merely a memorial, in a prescribed form, is copied on the records.

The third or judicial system prevails to some extent in Russia, Turkey, Norway, Mexico, and some other countries. Its adoption was discussed in England and a report was made in its favor by a commission appointed by Parliament in 1830. It, however, was first adopted in South Australia at the instance of Sir Robert Torrens in 1857, and in the first two years 1,000 titles were registered under it, though the system was, as usual, optional. A similar act was passed in Queensland in 1861, in New South Wales, Victoria, and Tasmania in 1862, in New Zealand in 1870, in West Australia in 1874, and in Fiji in 1876. Though there is some diversity in these statutes, the system has thus prevailed in Australia, and indeed throughout Australasia, for something like half a century. The Torrens law was adopted in the several provinces of Canada soon after its success in Australia had been demonstrated. A bill proposing a modified system was presented in the English Parliament by Lord Cairns, then solicitor general, in 1859. In 1862 a some-

what more comprehensive bill was passed at the instance of Lord Chancellor Westbury. This was amended at the instance of Lord Chancellor Selborne in 1873 and again passed in 1875. The act, however, was not made compulsory till 1897, and then only as to certain localities, including the whole of the county and the city of London.

In this country the first states to adopt it were Illinois, California, Massachusetts, Oregon, Minnesota, and Colorado. In many other states the system has since been adopted, including our own.

In regard to the constitutionality of such statutes it may be said that while in one or two instances objections have been maintained and upheld by the court, yet in the main these statutes have stood the test and it is now pretty well settled that such statutes are constitutional. Some of the objections which have been urged against such statutes have been that they deprive persons of property without due process of law, deny the equal protection of the laws, commit to the judicial department administrative and executive functions, delegate to ministerial officers such as examiners, registrars, etc., judicial powers, constitute special legislation, create new offices not filled by appointment or election in accordance with the state constitution, delegate legislative power in so far as they make the operation of the statute dependent upon a favorable vote by each particular county or city, and various other similar objections.

In looking at the procedure to be had under this act we see that the initial registration of the title, that is, the establishment of a certain point from and after which all the world is bound, must necessarily rest upon such judicial proceedings as will meet the constitutional requirements, and while this procedure varies materially under the different statutes the first and most essential step usually consists in the filing of an application or a petition setting out certain facts, a reference of such application to examiners for report to the court, the giving of sufficient notice or service of process in some manner prescribed by the statute, a subsequent hearing and determination by the court, a recordation of the court's determination and the issuance of a certificate to the holder of the recorded title. Such proceeding as that con-

templated by the statute is, in effect, an action in rem and in such proceedings all rules and principles of law applicable to ordinary actions and proceedings, and rules of practice with respect to trials, etc., should, unless it is otherwise provided, or clearly inappropriate, be followed and applied.

The next step is a reference of the application to an examiner of titles to investigate the title, all claims, etc., and report thereon to the court. The examiner's position, power and authority is to a great extent similar to that of master in chancery, and the proceedings before him are also similar. The court is not bound by the report of the examiner but may hear further proof and determine the rights of the parties and the existence and validity of claims, as based upon all the evidence, regardless of the examiner's report.

As to who may maintain such a proceeding under the statute to have his title registered, it would seem that any person claiming to be the owner of property has such a right although there is no deed on record to constitute his evidence of title. In regard to those who may defend or object to such registration, it may be said that any person who claims any interest in or lien upon the property may appear and answer whether he has been summoned or had notice or not. Also the statute provides that all persons known as having a claim and interest must be made parties defendant, and that all persons unknown who have a claim and interest must be made parties defendant by some general designation.

Under such statutes it has been generally held that the burden of proof is upon the applicant to show a good and valid title to the property in question, although he is not obliged to establish the invalidity of opposing claims; such burden being upon persons asserting those claims.

In considering the question of the admissibility of evidence, we find that in such proceedings, except in so far as modified by statute, the general rules in civil cases apply and that any evidence otherwise competent is admissible if it has a legitimate bearing upon the question of title. However, it is held that abstracts or other secondary evidence of title are not admissible in

lieu of the original documents or records except and unless proper and sufficient foundation for the admission is first laid.

In regard to the weight and sufficiency of evidence in such proceedings, it may be said that to justify the court decreeing an initial registration of a title the evidence should establish a title in the applicant good as against the world, and identify and show the location of the property in question. Hence we see that it is essential that the conveyances upon which the applicant bases his claim shall identify the land so that it can be ascertained by description.

In proceedings to register title under such acts the court should hear and determine all controversies in regard to the title to the property, the existence and validity of all claims, liens, etc., and should determine all boundary lines and also the boundaries of highways along or on such land. In such proceeding while the court may determine the validity and priority of liens of conflicting claimants, such liens or claims cannot be foreclosed in the proceedings. And where the applicant establishes a title entitled to be registered in addition to a decree to that effect, he may have the claims of the defendants decreed to be but clouds upon his title If the applicant shows that he has title to a less amount than that described in his application the court may decree that that portion shall be registered. But if the applicant does not show such title as is entitled to registration the court should dismiss the proceedings, as the applicant is not entitled to any kind of a decree against the adverse claimants, nor can such adverse claimants have affirmative relief in such cases.

The statute makes proper and appropriate proceedings for an appeal from a decree in such proceedings.

We come now to consider the question of the operation and effect of the registration. In the first place it may be said that when a decree for registration has been rendered, the record made and the certificate issued, the land becomes registered land, and the system contemplates and it is sometimes provided by the statute that such land shall thereafter remain registered and that all transfers and dealings in relation thereto shall be made in accordance with the terms of and under the statute.

It has been said that the decree for registration constitutes an agreement running with the land that it shall remain registered and subject to the statute, although the proceedings were voluntarily instituted. Generally speaking, in as much as existing liens, etc., are noted upon the record and certificate, it may be said that the holder acquires an indefeasible title to the property free from all claims except those noted. However, there are certain statutory exceptions to this statement, such as where the statute provides for presentation of claims within a certain period, by certain persons or classes of persons, as well as in cases of fraud, etc. Also the property is subject to certain claims, such as taxes and other encumbrances which are not appropriate matters of record.

In regard to subsequent encumbrances the statute provides the manner in which they shall be noted upon the certificate and record. In case of a conveyance a new certificate is issued in accordance with the terms of the statute, and if the usual deed of conveyance is made, and it usually is, it is merely a contract between the parties and is an authority for the transfer of the title to the grantee.

Another prominent feature in most all of the registration statutes is the provision for an assurance fund for the compensation of persons having claims, etc., against the property whose rights, their being no fault on their part, may be cut off by the decree. This fund is raised by requiring the applicant for registration to pay a certain per cent. dependent upon the statute of the assessed value of the property. This provision as to the assurance or indemnity fund is one of objections which has been relied upon to the constitutionality of such statutes, and in Ohio the court has held that such statutory provision was unconstitutional. But in other jurisdictions this question does not seem to have been directly passed upon.

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